United States Court of Appeals

for the Second Circuit

EXHIBITS

B

Exhibit

United States ex rel. James W. Rogers
v. LaVallee, Warden

74-2361

(2)

SUPREME COURT : KINGS COUNTY

CRIMINAL TERM : PART II in VI

- x

THE PEOPLE OF THE STATE OF NEW YORK

-against-

Jury Charge

JAMES W. ROGERS,

Defendant

- x

Indictment # 217/69 (Murder)

Brooklyn, New York
October 21, 1969

B e f o r e:

HON. FRANKLIN W. MORTON, Jr., Justice

A p p e a r a n c e s:

LOUIS ERNEST, Esq.
Assistant District Attorney
For the People

ALBERT BRACKLEY, Esq.
44 Court Street
Brooklyn, New York 625-5884
For the Defendant

Dorothina P. Neal, C.S.R.
Official Court Reporter

and I feel that in this particular trial, since we are not on trial for the robbery, the remark in context in which it was made was highly prejudicial to the defendant.

THE COURT: Motion denied.

RECESS.

(AFTER THE RECESS THE FOLLOWING OCCURRED.)

COURT CLERK: Both sides waive the jury roll call?

MR. ERNST: Yes.

MR. BRACKLEY: Yes.

COURT CLERK: The Court is about to charge the jury. All persons desiring to leave may do so now. You will not be permitted to leave during the Court's charge.

THE COURT: Members of the Jury: You have been called upon to render a most important service. A juror assumesgreat responsibility when he or she sits in judgment upon another and determines the issue of fact that arises in a trial such as this. Both People and defendant are entitled to a fair and impartial trial. Both must receive equal consideration under the law. Counsel for both sides have chosen you upon your sworn promise to render a verdict made

solely on the evidence and on the law.

This Court consists of two parts, the jury and the judge. You the jury are the sole and exclusive judges of the fact, of the credibility of the witnesses, of the weight and sufficiency of the evidence and of the guilt or innocence of the defendant. The number of witnesses should not concern you. The quality of their testimony should. It is your obligation to consider the evidence adduced on direct and cross examination. You have a duty to the defendant to carefully consider the evidence. After you come to a conclusion as to the fact, you find that there is a reasonable doubt as to the guilt of the defendant, it is your duty to acquit him and do not hesitate to do so under such circumstances. That is your duty and the defendant's absolute right. You also have a duty to the People of this State to weigh the evidence carefully. If you find after weighing the evidence that the defendant is guilty beyond a reasonable doubt, it is your duty to convict him. Neither duty is more important than the other. You find the facts. You apply the law as I give it to you to the facts and bring in your verdict accordingly.

My function is to preside at the trial, to con-

duct and fairly and impartially and in an orderly manner to charge you upon the law, to rule upon the objections, motions and admissibility of evidence. You must accept the law from the Court. You are bound by my ruling. As you are supreme in the determination of the facts, the Court is supreme in the determination of the law. We must not invade each other's province. When I made rulings upon questions of law, upon motions, upon objections and upon the admissibility of evidence, I did not make them arbitrarily. I made them in accordance with the law. I did not intend in any ruling I made or by any question I asked to convey to you that I have an opinion as to the guilt or innocence of this defendant.

This case comes before us by way of an accusation called an indictment. An indictment is a written accusation charging the defendant with a commission of a crime. It is without probative force. It is not evidence and it carries with it no implication or suspicion of guilt.

I will now read the indictment to you. "First count, the Grand Jury of the County of Kings by this indictment accuses the defendant of the crime of murder committed as follows: The defendant on or

about and between January 8th, 1969 and January 9th, 1969 in the County of Kings having attempted to commit and committed the crime of kidnapping and in the course of and in furtherance of such crime and in immediate flight therefrom caused the death of Delia Mott, she being other than one of the participants by asphyxiating and by sexually violating and sexually abusing the said Delia Mott, thereby inflicting divers wounds and injuries upon the said Delia Mott and there after and on or about and between January 8, 1969 and January 9, 1969, the said Delia Mott died of said wounds, injuries and asphyxiation.

Second count: The Grand Jury of the County of Kings by this indictment accuses the defendant of the crime of murder committed as follows: The defendant on or about and between January 8, 1969 and January 9, 1969 in the County of Kings with intent to cause the death of Delia Mott caused the death of Delia Mott by asphyxiating and by sexually violating and sexually abusing the said Delia Mott, thereby inflicting divers wounds and injuries upon the said Delia Mott and thereafter and on or about and between January 8, 1969 and January 9, 1969, the said Delia Mott died of said wounds, injuries and asphyxiation.

Third count: The Grand Jury of the County of Kings by this indictment accuses the defendant of the crime of kidnapping in the first degree committed as follows: The defendant on or about and between January 8, 1969 and January 9, 1969 in the County of Kings did abduct Delia Mott and did restrain the said Delia Mott for a period of more than twelve hours with intent to inflict physical injury upon the said Delia Mott and to violate and abuse her sexually.

Fourth count: The Grand Jury of the County of Kings by this indictment accuses the defendant of the crime of kidnapping in the first degree committed as follows: The defendant on or about and between January 8, 1969 and January 9, 1969 in the County of Kings did abduct Delia Mott who died during such abduction before she was able to return and to be returned to safety."

I have read you the charges contained in the several counts of the indictment. It might be well at this time for me to read to you the provisions of the Penal Law which it is charged the defendant violated.

Section 125.25, "Murder: A person is guilty of murder when with intent to cause the death of another

person he causes the death of such person--". I am only giving you the provisions applicable to the case before us. "--acting either alone or with one or more other persons, he commits or attempts to commit kidnapping." That is one of the many crimes mentioned, but that is the one we are concerned with in this case of

"And in the course/and in furtherance of such crime or in immediate flight therefrom, he causes the death of such person."

Section 125.20 of the Penal Law, Manslaughter in the first degree. You notice that this was not in the indictment, but I am required under the law to charge you as to the lesser degree of crime charged in the indictment where they are pertinent to the case.

"A person is guilty of manslaughter in the first degree when with intent to cause serious physical injury to another person, he causes the death of such person."

Manslaughter in the second degree, Section 125.15 of the Penal Law. "A person is guilty of manslaughter in the second degree, when he recklessly causes the death of another person."

Section 135.25, Kidnapping in the first degree: "A person is guilty of kidnapping in the first degree

when he abducts another person and when he restrains the person abducted for a period of more than twelve hours with intent to inflict physical injury upon him or violate or abuse him sexually." That term, "him" being used narratively and includes also her.

Section 135.25 of the Penal Law, this is another subdivision. Three, "The person abducted died during the abduction or before he able to return or to be returned to safety."

Kidnapping in the second degree, "A person is guilty of kidnapping in the second degree when he abducts another person."

Now the first count of the indictment charges the defendant with murder. In the usual circumstances, if you do not find that the evidence establishes that the killing was done with intent to cause death, you can not find that it constituted murder. However, under the first count of the indictment, death or killing does not have to be intentional. This murder without proof of intent we call felony murder. The intent to commit the murder in person is automatically considered the intent to kill.

Now, to convict this defendant of murder under the first count, the People must prove beyond a rea-

sonable doubt that the defendant did commit or attempt to commit the crime of kidnapping, that in such course or in the futherance of kidnapping, the defendant caused the death of Delia Mott and that the death was caused either by asphyxiation or by sexually violating and sexually abusing Delia Mott or both. Now, if you find the defendant guilty beyond a reasonable doubt of murder under the first count, you may consider the second count of the indictment but in the event you find that the People have failed to establish or prove the defendant's guilt beyond a reasonabl doubt, you must acquit the defendant under the first count of this indictment and proceed to the second count of this indictment. Now, before we proceed to the second count of the indictment I want to call to your attention another important section of our law which states: "No person can be convicted of murder or manslaughter unless the person alleged to have been killed--" That's Delia Mott in this case. "--and the fact of her killing by the accused as alleged are each established as independent facts." The death of Delia Mott by direct proof and the fact that she was killed by the accused, by the defendant, may be shown by circumstantial evidence or direct evidence in each

instance beyond a reasonable doubt.

Now, this is what is commonly known as a corpus delicti in our court of law. In simple language it means that before the defendant may be found guilty, the prosecution must prove by direct evidence the death of Delia Mott, that the body that was described to you, the body that was identified and the body on which the autopsy was performed was Delia Mott.

Now, under the corpus delicti the People must prove that the decease did not die of natural causes or that she did not commit suicide. In other words, that it was a criminal death and an unlawful killing and the People must do that by direct evidence and must prove beyond a reasonable doubt that what caused the death was due to felonious conduct.

Now to establish this requirement the People called Dr. Dominic Demaio who testified that he is the Deputy Medical Examiner in charge of the Borough of Brooklyn and that he examined the body and that he performed an autopsy upon that body and you heard what he said; the death was caused by mechanical asphyxiation, penetrating lacerating wounds of the genitalia and that he has performed a number of autopies, over 14,000 I think he said, and his quali-

fications were conceded by the defense counsel, and while he was really testifying as to his opinion, nevertheless, in his background in that he was qualified, you may adopt his opinion as your own insofar as the cause of death is concerned.

Now, the second count of the indictment deals with intentional murder and it requires for its establishment that the People prove to your satisfaction beyond a reasonable doubt that the defendant intended to cause the death of Delia Mott and that he actually caused the death of Delia Mott. Now, I must tell you too that there are two kinds of intent involved here. One is the simple intent which is needed to establish every crime, that is to do the act itself. The other kind of intent is the specific intent described in the statute. That is the intent to kill another person, in this instance Delia Mott. In other words, to convict of murder under the second count, the People must establish beyond a reasonable doubt two different intents. One, that the defendant intended to asphyxiate or sexually abuse and sexually violate the decease, and two, that he also intended to kill her. If you find the defendant guilty beyond a reasonable doubt of murder under the second count

of this indictment, you need go no further, but if you find him not guilty of murder under the second count, you may then consider whether he has been proven guilty beyond a reasonable doubt of manslaughter in the first degree.

Now, the law provides, and I now quote, "When it appears that a defendant has committed a crime and there is a reasonable ground of doubt in which or more degrees he is guilty, he can be convicted of the lowest of those degrees only." However, while it is within your power to find a verdict of guilty of a lesser degree than the one charged in the indictment, that power must not be arbitrarily used in disregard of the evidence. The jury is duty bound to find a verdict in accordance with the evidence.

Now, manslaughter in the first degree is defined as I have stated to you as a person is guilty of manslaughter in the first degree when with intent to cause serious physical injury to another person, he causes the death of such person. The essential elements that the prosecution must establish beyond a reasonable doubt in convicting the defendant of manslaughter in the first degree are as follows: The People must prove that the defendant intended to

cause serious physical injury to Delia Mott and that he actually caused the death of Delia Mott. By serious physical injury, the law means physical injury which creates a substantial risk of death, which causes death, a serious or protracted disfigurement, protracted impairment of health, protracted loss or function of the body. You will note in the indictment and in the Penal Law the word intent is used. The culpable mental state of intentional is defined as the doing of an act deliberately, willfully, feloniously as distinguished from the doing of an act by mistake, by accident, by negligence and by carelessness. Intent is the operation of a person's mind. When you determine another's intent, you are attempting to determine just what he had in his mind at the time he is alleged to have committed the intentional act. The culpable admitted fact of intent may be inferred from all the circumstances in this case, what he said by his comment, by his speech or a combination of all.

Under our law, a person is presumed to intend the natural and probable consequences of his act. This presumption like all presumptions may be rebutted and may be accepted or rejected by you. If you conclude

that this defendant committed the act charged, that is causing serious physical injury to Delia Mott thereby causing the death of deceased Delia Mott, then you must decide whether this serious physical injury was done deliberately and intentionally as distinguished from being done by negligence or accident, and if you so decide beyond a reasonable doubt, then you must find the defendant guilty of manslaughter in the first degree. If you decide that the act was deliberate and intentional and not negligence or an accident, you must find under the second count of the indictment, manslaughter one, and if you get to that point, you must find the defendant guilty of manslaughter in the first degree. However, if you find that he is not guilty, that is you find that there is a reasonable doubt as to manslaughter in the first degree, then you may consider whether he has been proven guilty beyond a reasonable doubt of manslaughter in the second degree.

Now, manslaughter in the second degree is define in Section 125.15 of the Penal Law in this way: "A person is guilty of manslaughter in the second degree when he recklessly causes the death of another person In other words, all that is needed to establish man-

slaughter in the second degree is to establish that the defendant caused the death of another and that it was his recklessness that caused such death.

Please note that no intent to kill or injure is necessary for manslaughter in the second degree.

The word reckless is defined in the Penal Law as follows: "A person acts recklessly with respect to a rule or to a circumstance described by the statue defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that such results would occur, that such circumstance does exist. The risk must be of such nature and degree that this risk constitutes a gross deviation of the standardsof conduct of a reasonable person, that is, conduct that a reasonable person would observe in the same situation." If you find that the defendant caused the death of Delia Mott and that it was his recklessness that caused her death, then you may convict him of manslaughter in the second degree. However, if you believe that the People failed to prove the crime or manslaughter in the second degree beyond a reasonable doubt, then you must acquit the defendant and proceed to the third count of the indictment.

The third count of the indictment charges the

defendant with the crime of kidnapping in the first degree, charging that he did abduct Delia Mott and restrained her for more than a period of twelve hours with intent to inflict physical injury and to violate and abuse her sexually. The essential elements under this count which the People must prove beyond a reasonable doubt are stated in Section 135.25, Subdivision 2 as follows: "A person is guilty of kidnapping when he abducts another person and when he restrains the person abducted for a period of more than twelve hours with intent to inflict physical injury upon the person or violate or abuse her sexually."

Now, I previously defined intent for you and I shall not repeat the definition again unless you request it later on, but I will give you the statutory definition of abduction. "Abduction means to restrain a person with intent to prevent his liberation by either secreting or holding him in a place where he is not likely to be found or using or threatening to use deadly physical force."

The word restrain in the Penal Law is described as follows: "Restrained means to restrict a person's movements intentionally and unlawfully in such a manner as to interfere substantially with his liberty

by moving him from one place to another or by confining him either in the place where the restriction commences or in a place to which he has been moved without consent and with knowledge that the restriction is unlawful. A person is so moved or confined without consent when such is accomplished by physical force, intimidation, deception or any means whatever including acquiescence of the victim, if he is a child less than 16 years of age or an incompetent person and the parent, guardian or other person or institution having lawful control or custody of him has not acquiesced in the movement or confinement."

Now, in your deliberation under the third count, you must decide whether the People have proven beyond a reasonable doubt that the defendant James Rogers did abduct Delia Mott, did restrain Delia Mott, the abducted person, for more than a period of twelve hours and that he did so with intent to inflict physical injury and to violate and sexually abuse Delia Mott and that the defendant did accomplish the aforementioned physical injury or sexual abuse.

The same rules apply as I have stated to you under count number one and two of the indictment. You must find all these elements have been proven to

you beyond a reasonable doubt in order to convict the defendant of the crime of kidnapping in the first degree under the third count; otherwise you must acquit the defendant and proceed to consider whether defendant committed the crime of kidnapping in the second degree.

Section 135.20 of the Penal Law states, "A person is guilty of kidnapping in the second degree when he abducts another person."

Now, I have just explained the definition of abduct stated in the law and therefore the only element necessary to convict the defendant of this crime is to determine whether the person Delia Mott was abducted.

If you find beyond a reasonable doubt that the defendant did abduct Delia Mott, then you must convict him of the crime of kidnapping in the second degree, but on the other hand if you believe that the People have not proven beyond a reasonable doubt the charge of kidnapping in the second degree, then you must acquit the defendant and proceed to the fourth and final count of the indictment.

Again the defendant is charged with the kidnapping, the crime of kidnapping in the first degree, but

this time under Subdivision 3 of Section 135.25 of the Penal Law which states: "A person is guilty of kidnapping in the first degree when he abducts another person and when the person abducted dies during the abduction."

Now, to convict the defendant under the fourth count of the indictment, the People must prove beyond a reasonable doubt that the defendant did abduct Delia Mott and that Delia Mott died during the abduction under the fourth count. If you find beyond a reasonable doubt that the People proved that the defendant did perform those two elements then you must convict the defendant. However, if you believe that the People have failed to prove to your satisfaction the elements which I have just described, then, of course, you must acquit the defendant under the fourth count of the indictment and then you may consider the lesser degree of the crime of kidnapping in the second degree, and I'll repeat that for you. "A person is guilty of kidnapping in the second degree when he abducts another person."

Now, I have just explained the definition of abduct as stated in the law and therefore the only element necessary to convict the defendant of the crime

of kidnapping in the second degree is for you to determine whether this Delia Mott was abducted by the defendant. If you find beyond any reasonable doubt that the defendant did abduct Delia Mott, then, of course, you must convict. On the other hand, if you find that the People have failed to prove that this defendant abducted Delia Mott, you must acquit him if they fail to prove beyond a reasonable doubt that such abduction took place.

The defendant upon arraignment pleaded not guilty to this indictment. Under our law every defendant indicted is presumed to be innocent of the charge or charges against him. That presumption of innocence belongs to and remains with him throughout the entire trial and is his until such time as you the jury may unanimously agree that by credible evidence his guilt has been established beyond a reasonable doubt. Only at that time does the presumption of innocence cease to exist.

The burden of proving the guilt of the defendant rests at all times upon the prosecution. Under our law a defendant is not obliged to prove his innocence. Before you can find the defendant guilty, you must be convinced that each and every element of the crime

charged and his guilt has been established beyond a reasonable doubt.

Evidence which is evenly balanced is naturally not beyond a reasonable doubt and in such a case, the defendant must be acquitted. The evidence in this case is the oral testimony of the witnesses and the exhibits admitted into evidence during the trial.

The defendant by his plea of not guilty is denying his guilt and every material charge made by the prosecution is put before you because of that denial. That denial throws upon the prosecution the burden of proving beyond a reasonable doubt every essential fact necessary to his guilt before a verdict of guilty can be reached.

As I have said, the prosecution has the burden of proving the guilt of this defendant beyond a reasonable doubt by the credible evidence. By reasonable doubt, I mean an actual doubt that you are conscious of having after going over in your mind the entire case and given consideration to every part of the evidence. If you then feel uncertain and not fully convinced that the defendant is guilty and you believe that a man in a manner of like importance would hesitate to act because of such doubt as you are conscious of having,

that is a reasonable doubt which the defendant is entitled to have the benefit of. The reasonable doubt is not a mere whim, guess or surmise. It is not a subterfuge or excuse to which resort may be had in order to avoid doing a disagreeable thing. It is such a doubt as a reasonable man would entertain after careful and honest review and consideration of all the evidence in the case. It is a doubt that must be founded in reason and must survive the test of reason. It must be founded on evidence or lack of evidence.

The law requires that before you come to a conclusion of guilt of a defendant, you must be convinced that his guilt has been established to your satisfaction beyond a reasonable doubt but not beyond all doubt or to a mathematical certainty because in many cases all doubt and to a mathematical certainty would be an impossibility.

In order to determine the credibility of the witnesses in this case and the weight to be given to their testimony, you have the right to employ all the considerations which you ordinarily employ in your daily lives in judging statements made to you. When a person makes a statement to you, you look him over and size him up. Therefore you should consider the

witness' demeanor, background, his or her candour or lack of candour, possible bias, means of information and accuracy of recollection. That is why witnesses take the stand and face the jury. You should also consider whether the witness' testimony is supported or contradicted by other credible testimony or circumstances. You should consider whether a witness has an interest in the outcome of the case.

As a matter of law, I charge you that the defendant is an interested witness in this case. When a witness has an interest in the result, the temptation to color his or her testimony or to withhold certain facts is strong. If you believe that any testimony has been affected by the personal interest of any witness, you should determine to what extent in considering the weight to be given to the testimony of that witness and how much is worthy of credit or belief. However, it does not mean that just because a witness has an interest in the outcome of the case he is not telling the truth. If you find and believe from the evidence that any witness has knowingly and willfully testified falsely to any material fact or circumstance in this trial or that any witness has knowingly and willfully exaggerated or suppressed any

material fact or circumstance for the purpose of deceiving, misleading or imposing upon you, then you have the right to reject the entire testimony of such witness except insofar as the same is corroborated by other credible evidence or believed by you to be true.

Now, testimony of any prior hearings before this trial may have been used but is admissible solely for the purpose of impeaching the credibility of the witness.

Now, when a person admits to a conviction of a crime for which he has previously been convicted, the law says that you may take into account the admitted conviction for only one purpose, and that is to determine his credibility or believability. In other words the law holds such a person may not be telling the truth. However, a person who has been convicted of a crime may still be telling the truth. That is for yo to say. In other words, in appraising the testimony of such persons, and we have two people here, Reginal Fenner and James Rogers the defendant, who have admitted to crimes, no one else, you may take into consideration whether the conviction of the crimes affects the credibility or believability of either testimony, either of Fenner or of defendant Rogers, and if so, to what

extent. If you think it does, consider it. If you think it does not, disregard it. However, under no circumstances may you consider such prior convictions as evidence of the defendant's having committed the crime with which he is now charged. In considering the credibility of witnesses where there is a discrepancy between the evidence given by them, it is your duty to reconcile this discrepancy if you are able to do so, but if you cannot do so, you may say I believe witness A and disbelieve witness B and so make up your minds as to the credibility that you accord the different witnesses.

If during the course of my charge or at any time during the trial I state facts different from what you recall them to be, or if you find that the lawyers during the course of the trial have stated facts different from what you recall them to be or to have been testified to, then wherever there is such a discrepancy, if you cannot reconcile the discrepancies with your own version of the testimony, rely upon your own recollection because that is your version.

The facts as established at this trial are equally susceptible to two inferences; one of which is consistent with guilt. Then the law requires that

under such circumstances you must accept the inferences of innocence and acquit the defendant. You are not concerned with punishment in deciding the guilt or innocence of the defendant. You are not permitted to discuss it. It must have no part in your deliberation. Punishment rests with the Court who has the burden of fixing punishment as may be provided by the law.

I am about to outline for you the testimony of the witnesses in this case. You must remember, however, that it is your recollection of the evidence and testimony that controls, not mine. You are not to be influenced by what you may believe my opinion is in this case. So far as you are concerned, I have no opinion or judgment.

Now, it is the testimony of the People's witnesses, Mrs. Emily Walker, Mrs. Beatrice Mott and Elsie Mott that time was required in reaching Cumberland Hospital. This is substantially the same as the testimony of the defendant. Mrs. Walker, the aunt of the deceased Delia Mott and Mrs. Mott a maternal grandmother, and Elsie Mott, the mother, relate that on January 8, 1990 sometime between 6 p.m. and 6:30 p.m., they along with Delia Mott, a 16 month old child, en-

tered the defendant's taxi cab in the vicinity of Fulton and Hall Streets in Brooklyn. Elsie Mott was pregnant and the time had arrived for her to go to the hospital. Defendant denies any knowledge of Delia the child entering the cab. Elsie was possessed of a diaper bag containing diapers, pampers, green pants, registration card, Medicaid card and a small purse con taining two cuff links, a ten dollar bill and change. The defendant denies any knowledge also of this diaper bag or of its contents. The taxi traveled to the 79th Precinct, Emily going into the precinct speaking to the desk officer at about 6:35 p.m. Patrolman James O'Connell states that he was assigned to escort the taxi to Cumberland Hospital and further testifies that he turned on the siren and the patrol car and the taxi cab arrived at Cumberland Hospital's emergency entrance in about five or six minutes. Patrolman O'Connell then assisted Elsie Mott, the pregnant woman and Mrs. Beatrice Mott into the hospital while Mrs. Emily Walker, the sister of Elsie and aunt of Delia, remained in the taxi cab with the child Delia and the defendant. The diaper bag made of beige cloth brownish with flowers and its contents were left in the taxi with Mrs. Emily Walker and the child. Emily

Walker asked the defendant could he change a twenty dollar bill. Patrolman O'Connell returned to the radio patrol car, asked the defendant to move his car from the driveway of the hospital. Patrolman O'Connell asserts he observed the child in defendant's car at the hospital on two occasions, before going into the hospital and while speaking to the defendant about moving his cab at which time he was 10 to 15 feet from defendant's car. Defendant states that on January 8, 1969, he was coming down Fulton Street, saw three ladies standing on the street waving. Defendant stopped and picked them up. He learned that one lady was having labor pains and desired to be rushed to the hospital. Defendant stated he suggested going to the 79th Precinct to obtain escort service. One of the lady's went into the precinct, came out with a police officer and they were escorted to the hospital. Defendant states they arrived at the hospital at approximately 7 p.m., and defendant testified that he did not know whether there was a baby in the car and he did not look to see. Defendant states that two women got out of his cab at the hospital and one remained in the cab. Defendant did not pay any attention as to whether there was a baby in the cab. Defendant did

see the officer get out of the police car and go towards the entrance of the hospital. The patrolman was to the rear of the defendant's car going to the patrolman's car and didn't come over to the defendant's car. The patrolman told defendant that he can't park as it was a private driveway. Defendant further said that the woman in the cab asked him if he had change for a twenty and his answer was in the negative, no. Emily Walker tells us that after Patrolman O'Connell spoke to defendant about leaving the driveway, the defendant pulled up to a candy store in the vicinity of Cumberland and Park Avenue. Emily Walker again asked the defendant for change of a twenty dollar bill and again the response was no. The defendant then left the car while she remained in the car and the defendant entered a grocery store. Upon defendant's return, Emily Walker once again requested change, but again the defendant stated he did not have any. She requested that defendant mind the baby and he said that he would while she obtained change. Emily Walker entered the candy store and purchased a T. V. Guide and two packages of cigarettes. She returned to the cab, and it was gone and there was no sign of the baby nor the diaper bag. Emily Walker immediately returned to the candy store, called the operator and asked for the

police. Louise Mattiaccia testifying in People's case stated that she was the proprietor of a candy store located on Park Avenue between Cumberland and North Oxford and that on January 8, 1969, Emily Walker whom she knew as a customer, came into her store about 7 p.m. and she purchased two packages of cigarettes and a T. V. book. Emily gave Mrs. Mattiaccia a twenty dollar bill from which was deducted the price of the purchased articles and the change returned to Mrs. Walker who accepted the change and walked from the store. Emily Walker returned in about one half minute and requested Mrs. Mattiaccia to change a quarter and Mrs. Mattiaccia saw Emily Walker then enter a telephone booth and saw her come out of the booth in about a minute and exit to the street.

Upon cross examination Mrs. Mattiaccia said that Emily Walker could have returned to the store anywhere from a few seconds to about three minutes. In other words, on direct examination she said a half minute and on cross examination it could have been anywhere from a few seconds to three minutes.

Defendant's version of this incident is that the lady asked him to change a twenty dollar bill and he stated he didn't have the change and she requested to

be driven to the grocery store. Defendant left the cab and the lady left the cab at the same time. They went to the door of the grocery store and defendant told her to get a beer in the grocery store and she says it was too crowded, she desired to go next door to the candy store. Defendant entered the grocery store and waited in line until he was served a beer which he then carried to the cab. He does not know how long he was in the store but as he was coming from the store he observed a lady getting into the cab. Pursuant to the lady's direction, defendant then drove to the emergency entrance of the hospital and subsequently defendant stated he drove the lady to the front of the hospital and that the lady paid him a dollar twenty-five just before she left the cab. Upon being cross examined, the defendant stated that he saw the lady as she was leaving his cab with either a baby or a bundle. He doesn't know which. This was the first occasion that he had noticed the baby or the bundle. Defendant further stated he did not look around when the lady paid him because he was driving. He didn't look back. He didn't know how the lady paid him. He just knows that she put it in his hand. Defendant noticed the baby or the bundle as the lady

was getting out and closing the door of the cab. Defendant could see the baby or bundle as she got out by glancing to see whether the door of his cab had been closed. Defendant stated that he thought he saw a baby or a bundle and said that he was paid a dollar twenty-five in front of the hospital at about five to seven or close to it. He then drove to Gates and Marcy Avenues to a grocery store owned by Dora Crandell and her husband. Defendant had made an earlier appointment in the day to pick up the mother of Mrs. Crandell at 7 p.m.

Dora Crandell testified in defendant's case that on January 8, 1969, she saw the defendant between 7 and 7:20 p.m. Her mother had just left and she informed the defendant. Defendant states that Dora Crandell did not approach the car as she was closing the store. He spoke to her through the car window and defendant then proceeded in the direction indicated by Mrs. Crandell as that having been taken by her mother, but defendant did not see her, so he continued to the vicinity of Henry Pearson's place, parked the car, went in and spoke to Henry Pearson and then proceeded six doors away to the home of Gloria Thomas. Defendant remained there for a few minutes, picked up

his enlarger which he had left there and took it to Henry Pearson's. Defendant does not know how long he was at Reverend Pearson's. Defendant then went to the store for ice cream and soda for the children of Gloria Thomas and soda for Reverend Pearson. Defendant was in the store long enough for people in the front of him to be served and him to be served. Defendant could not state what the time was. He returned to the home of Gloria Thomas, left the ice cream and soda and also left the soda at Reverend Pearson's door. Defendant then drove his car to a Shell gasoline service station at Throop and Gates Avenue where he had gone and had been told that Henry Pearson had gone there to get gas; so he saw Henry Pearson and Fred Harris, and he drove Henry Pearson back to the car with the gas that Reverend Pearson had purchased. Defendant knows that this was after 7:30 p.m. He returned to the home of Gloria, remained there a little while and proceeded to a bar at Lexington and Marcy Avenues.

Gloria Thomas has testified that the defendant visited her home on Wednesday to obtain a picture enlarger which belonged to defendant. Defendant came there once before the Beverly Hillbillies' program and once again after the program had gone off, and her

recollection was refreshed that instead of the program commencing at 8 p.m. that it commenced at 9 p.m.

Reverend Henry Pearson stated that he had seen the defendant on the night prior to his arrest and had been given an enlarger by the defendant at the center located at 470 Gates Avenue. That is the center that the Reverend Pearson ran. He said the defendant did drive him from the Shell service station to the center and that the center was closed sometime between 8 p.m. and 8:30 p.m. and he was leaving to attend another church and as Reverend Pearson was proceeding to the other church, he observed a clock somewhere downtown and the clock's handles were 8:45 p.m. He indicated it was 8:45. Upon being cross examined, Reverend Pearson asserts that he doesn't know the date that he is talking about, he is not sure of the date and is not sure of the month and the defendant testified that when he arrived at the T. and S. Bar, Charles the bartender, that is Charles Fuller, informed him that Reggie had called, Reggie Fenner, and wanted to be picked up at his job. While at the said bar, defendant spoke to Lottie Rhodes about 11 p.m. He does not know how long he had been at the bar at the time he had spoken to Lottie, but does say that he

left the bar about one and a half hours after she came.

Charles R. Fuller testified in defendant's case, that he is the bar owner and attended the bar located at Lexington and Marcy Avenues, that the defendant came in a few moments prior to the New York Knicker-bocker-Baltimore Bullets' basketball game. The game came on at 9 p.m. He asserts that defendant spent practically most of the night at the bar. The witness had received a telephone call from Reggie Fenner for Roger. Upon cross examination the witness states that he does not remember what time defendant came into the bar or what time defendant left the bar.

Lottie Rhodes testified that she saw and spoke to defendant at approximately 10:55 p.m. on the night prior to his arrest in the bar on the corner of Marcy and Lexington Avenues. She spoke to defendant about two minutes and that is all she knows. Defendant states that one and a half hours after speaking to Lottie Rhodes, he left the bar to pick up Reggie Fenner and a person known as Connie Epsom and a person known as Woddie accompanied him to Nedicks. Reggie was not ready, so defendant states that Reggie prepared food for the defendant and his two companions and after

eating, defendant left with the companions returning to the T. and S. Bar and that Reggie had told the defendant if he did not show up to get him that Reggie would call down to the bar. Defendant does not know how long he remained at Nedicks and defendant and Connie, after leaving Woddie at the bar, proceeded to the White Castle where defendant saw a friend Naomi Williams. Defendant does not know the time.

Reginald Fenner states that on Wednesday, January 8, 1969, he was employed on the 3 p.m. to 12 midnight shift at Nedicks. He saw defendant with a girl and a fellow and he had called the T. and S. Bar for the defendant. He told the defendant, when defendant arrived at his Nedicks place, to wait until he had finished cleaning but was told by the defendant that defendant was going on to take Woddie back to the bar, and Mr. Fenner served him. They ate and talked for a while and then the defendant and his companions departed.

The witness stated he started to clean at about 11 p.m. and it took him approximately one hour to clean up. At the closing up Nedicks, witness went t the T. and S. Bar with Reggie but does not know the time. The witness does not know how long the defen-

dant remained at Nedicks, and he states upon being cross examined that he does not know the time he telephoned the bar for the defendant, nor does he know the time span between calling the bar and his leaving Nedicks to go to the bar. Reginald Fenner admits to having been convicted of a crime of burglary and assault.

Naomi Williams testified that she does not know the date that she last saw the defendant before he was arrested.

Now Albert Spivey in the People's case testified that at approximately 12:30 a.m. on January 9, 1969, he approached the right hand gate of a Bohack parking lot located on Gates Avenue near Bedford, and he observed the car stopped at the left hand gate. Mr. Spivey saw a figure walking around with the headlights of the car on him. The figure appeared to go looking for something. The witness proceeded into the lot and parked his car. The man moved the car in what appeared to be a semi-circle and as Mr. Spivey walked from the parking lot, he noticed that the car had backed up. The car was two toned with a light top and a dark bottom. Witness identified defendant as being the person he saw in the Bohack lot

January 9, 1969 at about 12:30 a.m. Upon being cross examined, Mr. Spivey testified that it was dark. The lights in the Bohack lot were not on. The lights of the car were striking the bottom portion of the man while he walked up and down and there were cars between Mr. Spivey and the man and that the distance was between 30 to 50 feet, and he states that the man did not look in his direction but faced in his direction more or less. Mr. Spivey did not remember telling Detective Walsh that he was not sure that the defendant was the man. Upon re-direct examination Mr. Spivey stated that he did not want to be involved in this case, but that there was no doubt in his mind defendant was the man in the lot about 12:30 a.m. on January 9, 1969.

Back to the defendant's case: Defendant states that he was not in the Bohack's parking lot at any time that morning or night. Defendant states that he has not been in the parking lot or near it. Defendant states that he did not take a little baby girl away from in front of the candy store or by the hospital. He never committed any sexual act to the baby in question and he never strangled or killed the baby in any way. That the defendant admits to having been

convicted of the crime of attempted robbery and on another occasion for the crime of robbery. Defendant states that the colors of his cab are green and white.

Emily Walker testified that after she had telephoned the police from the candy store, she had left the candy store and saw a police patrol car as she was crossing the street. The officer spoke to her. She entered the car and they circled around but did not see the baby. They went to 88th Precinct where she spoke to Detective Shelton.

Patrolman Salvatore Fragapane in the People's case testified that on January 8, 1969 at about 7 p.m. he received a call and responded within three minutes to the Cumberland Hospital where he met Emily Walker standing in front of the hospital located on North Portland Avenue. He spoke to her, questioned her and put her into the radio car. They returned to the candy store, parked near Cumberland, got out and looked around for about five minutes. They returned to the 88th Precinct stationhouse where they spoke to Detective Shelton. They arrived at the precinct approximately 7:15 p.m. to 7:20 p.m. and the patrolman then resumed patrol duty.

Detective Shelton testified in the People's case

that at approximately 7:20 p.m. on January 8, 1969, a person named Emily Walker accompanied by a patrolman came to the 88th Precinct stationhouse. Detective Shelton and the patrolman spoke to Emily Walker. Detective Shelton took Mrs. Walker to the Cumberland Hospital and from the hospital to the Bureau of Criminal Identification of New York City in Manhattan, returned to the 88th squad, re-checked the vicinity of the hospital and went to see Mrs. Beatrice Mott at 117 North Oxford Walk, remained for five minutes, returned to the 88th squad, and they set out the first alarm at 11:27 p.m. About 7:30 a.m. on January 9, 1969, received a call to go to the Bohack on Gates near Bedford Avenue.

Now, Mr. Iovino testified in People's case that he is the manager of the Bohack store in question, Bedford and Gates, that on January 9, 1969, he opened the store about 7:15 a.m. He discovered a baby's body in a barrel to the rear of the Bohack store lot. He notified the police.

Patrolman Frank Armitage of the 79th Precinct stated that on January 9, 1969, pursuant to a message he arrived in his patrol car. He arrived at about 7:40 a.m. at the Bohack lot. He responded to the

scene in about one minute. He was directed by Mr. Ioviono, the manager, to a lot and was shown a garbage can. The patrolman looked and saw a nude body of a baby. He called central for assistance. He discovered a pink and white sweater, pink and white hat, green snowsuit jacket and outside the lot, he saw a disposable diaper in another garbage can.

On January 10, 1969, Patrolman Armitage went to the Brooklyn Medical Examiner's Office and identified the body in the morgue as being the body he had seen at the Bohack lot on January 9, 1969.

Joan Mott, testifying in the People's case, testified that she is an aunt of Delia Mott and that on January 9, 1969, she went to the Kings County Hospital morgue and identified the dead baby as being her niece Delia Mott. She was accompanied by Detective Shelton.

Detective Shelton states that after receiving a call to go to the Bohack lot about 7:30 p.m. on January 9, 1969, he responded and observed the body of a baby in the garbage can and picked up a change purse near the fence of the parking lot. There was one cuff link in the purse.

Detective Raymond L. Kenney in the People's case stated that he arrived at the Bohack lot about

7:55 a.m. on January 9, 1969, spoke to Mr. Iovino, examined the can in which the baby was found and searched the lot where he observed the dispos able diaper hood, sweater and hat. He was at the lot for more than an hour before the medical examiner arrived and removed the body.

Detective John Reyes of the Brooklyn North Homicide Squad stated that he responded to the lot at about 8:30 a.m.

Dr. Dominick J. Demaio testified in the People's case that on January 9, 1969, he responded to the Bohack lot in question at about 12 noon. In the righ rear can was the curled, young female, colored child, completely exposed except for stockings. On January 9, 1969, Joan Mott identified the body to hi as being Delia Mott, and that based upon his examina tion of the child, Dr. Demaio stated the cause of death to be mechanical asphyxiation, that is suffoca tion. Penetrating, lacerated wounds, that is the to of the genitalia which he stated are the private par In the opinion of Dr. Demaio, some hard object was placed into the baby's private part and a penis cou be such an object. Dr. Demaio stated with a reason degree of medical certainty upon cross examination that there would be injury to a penis injected int

this child.

Detective William F. Walsh testified that on January 9, 1969, he was on duty at the 79th Precinct and on that morning was assigned to a house to house canvass for witnesses. During this quest, search for witnesses, he met Mr. Spivey and Mr. Spivey gave Detective Walsh a description of a man allegedly seen by Mr. Spivey in the Bohack parking lot. Mr. Spivey told the witness, that is Detective Walsh, that the man was a male Negro approximately 5 feet 10, thin in the face, that he is 6 feet 2. That is my recollection. I heard 6 feet 1, 6 feet, but you allow your own recollection to govern. Wore a three-fourths length coat, tan, and had a brown complexion. Mr. Spivey said the man was to the rear of the parking lot back of Bohacks, to the right side of the parking lot and the lights of the car were on, the motor was running and the man was out of the car. Detective Walsh believes that Mr. Spivey told him the lights were facing the street and that Mr. Spivey stated he would never be able to recognize the car again. Detective Walsh also said that while Mr. Spivey was sitting in the Detective Squad room, the defendant, with three or four detectives, and he said upon being ques

tioned by Mr. Ernst, there were no more than seven, and it could have been five, walked into the room and the detectives were dressed in suits and ties and that Mr. Spivey got up and said, "I think that is the man." Mr. Spivey then told Detective Walsh, according to Detective Walsh, that he was not sure and that he did not want to be involved. Upon being cross examined, Detective Walsh stated that he spoke to Mr. Spivey a period of five or six minutes at the time he initially spoke to Mr. Spivey during the canvass and Mr. Spivey told the witness that he was not sure he could identify the defendant and that he did not want to be involved.

In the People's case, Patrolman Krieger and Patrolman Ralph Gallo of the 79th Precinct stated substantially that they were partners on duty January 9, 1969, and pursuant to information in their possession, they observed the defendant in the vicinity of Marcy and Gates Avenues, car standing, motor running at about 4:25 p.m. They removed the defendant Patrolman Gallo was seated in the defendant's car and they removed him to the 79th Precinct. The car was pulled into the stationhouse driveway. Defendant states that he pulled all the way into the garage.

Patrolman Krieger spoke to Mr. Armitage and proceeded to turn the defendant over to the detective.

Now, Patrolman Andrew Armitage states that on January 9, 1969, he was assigned to the 79th Precinct, that he was on special duty with a Patrolman Ellis guarding the precinct area and after receiving certain information from Patrolman Krieger with respect to the defendant's car which had arrived at about 4:45 p.m., the patrolman on duty stood by and observed the car and stated from the time it was parked until approximately 7 p.m., no one other than authorized police personnel touched the defendant's car. Witness Patrolman Armitage saw Detective Kenny enter the car and Detective Kenny states that he returned to the 79th squad room about 4:45 or 4:50 p.m. on January 9, 1969, and accompanied by Detective Grace, he conducted a search of defendant's car at approximately 5:55 p.m., and Detective Kenny found a cuff link in the front seat on the passenger's side. Detective Grace states that he saw Detective Kenny place his hand along the back rim toward the passenger side of the defendant's car, pulled something out and held up a cuff link. Detective Kenny brought it up to the squad room, took another cuff link from a little purse

and Detective Shelton testified that he had turned over the purse and cuff link that he had found at the Bohack lot to Detective Kenny, and Detective Grace states that Detective Kenny compared the cuff links.

Elsie Mott in the People's case identified the cuff links as having belonged to her for many years.

Now, there has been some testimony as to the defendant being seen in the Bohack parking lot by Mr. Spivey at about 12:30 a.m. on January 9, 1969.

Upon the question of identification, the burden of proof rests upon the prosecution to prove that the defendant is the man who was seen by Mr. Spivey at the time alleged and that proof must satisfy you beyond a reasonable doubt that the defendant was that man. The question of identification is perhaps one of the most difficult questions in which juries must deal. Evidence of identity should be as certain as human recollection under the most favorable circumstances permits. You have to decide whether the identification in this case is accurate and reliable. In arriving at the value of testimony as to identification, there are two elements of reliability. First familiarity with the person in the controversy and second, freedom from personal or party prejudice.

After familiarity and freedom from prejudice have been established, then you should test the capacity of the witness for observation, reflection, memory or reason as revealed by him on the witness stand. In that regard, you must consider all the circumstances under with the identification is made. You must consider the opportunity that the witness had to observe the defendant at the time of the alleged observation. How long a period of time was he under observation? How close was the defendant to the witness? What was the condition of the light? Was the clothing or physical appearance of the defendant such as would make a definite impression on the mind of the witness? Consider the time intervening between the time defendant allegedly was in the Bohack lot at the occasion the witness allegedly saw defendant at the 79th stationhouse as having some bearing on the probability as to whether the witness could remember the face of the perso in the lot. You must also take into account the witness' capacity for observation and his memory in all of the other tests and symptoms that are deemed necessary in determining the credibility of a witness. Yo must be cautious in weighing the proof of identity. It must be with sufficient certainty so as to preclu

the reasonable possibility of a mistake.

If you are satisfied beyond a reasonable doubt that the witness correctly identified the defendant as the one who was at the Bohack lot the morning of January 9, 1969, then you should find that the defendant was there. If, on the other hand, you are not satisfied beyond a reasonable doubt that the witness correctly identified the defendant as the one present at the Bohack lot on January 9, 1969, then you will find that the witness did not correctly identify this defendant, and you must consider this fact, if you determine it to be a fact, in addition to all the other facts which you find from the evidence in determining whether defendant was on the Bohack lot at any time the evening of January 8, 1969, or the morning of January 9, 1969. If you should find that the People failed to established to your satisfaction beyond a reasonable doubt that the defendant was on the Bohack lot, you must continue to examine all the evidence to determine whether a crime has been established under the Court's instructions.

Now, Members of the Jury, evidence is either direct or indirect. We call indirect evidence circumstantial evidence. Direct evidence exists when the

facts to be proven are directly attested by those who state from their own actual and personal knowledge obtained by means of their experiences. Now, when someone tells you that they saw this take place and they saw that take place, that is direct evidence and circumstantial evidence does not directly prove the controverted fact, see, so although you find that Delia Mott was in the cab when he drove away, if you find that the cab drove away with the child in the cab and that the cab driver had knowledge either then or you may imply subsequently, but that is direct evidence. Now, circumstantially if you find that there is sufficient direct evidence to base your determination upon, you may infer that the baby while in the defendant's cab or with him, did something happen to this baby and how you deduce this, you will deduce it in accordance with my charges as to circumstantial evidence as I will now give it to you.

Now, circumstantial evidence does not directly prove the consecrated fact. It is proof of collateral fact from which the fact in issue may be inferred. In attempting to prove a fact by circumstantial evidence, there are certain rules to be observed that reason and experience have found essential to the dis-

covery of proof and the protection of innocence. The circumstances themselves must be established by direct proof and not left to rest upon inference. The inference which it is to be based upon the fact and circumstances prove must be a clear, logical conclusion with an open and visible connection between the fact found and the fact to be proved. Now, in determining a question of fact from circumstantial evidence, the facts proved must not only be consistent with and point to the guilt of the defendant but must be inconsistent with his innocence.

In determining a question of fact from circumstantial evidence, there are two rules which you must follow. The inference of guilt must flow naturally from the facts proved and be consistent with it or more, and the evidence must be such as to exclude to a moral certainty beyond a reasonable doubt every inference of innocence. The facts proved must all be consistent with his guilt and inconsistent with his innocence. Now, it is incumbent upon you to take the law as I declare it to you. Now, what prior notions you might have had with respect to circumstantial evidence immaterial. The law of this State recognize that the acceptance in a court of justice of circum-

stantial evidence and the notion that some people have that direct evidence is always of a higher quality is not so. The Court of Appeals repeatedly has said that when circumstantial evidence is clearly established to the satisfaction of the jury beyond a reasonable doubt, it is satisfactory evidence and jurors may not hesitate to act upon such proof. While you are to consider the circumstantial evidence which was offered for the purpose of establishing the charges against the defendant, you are not to lose sight of the fact that the witnesses who have testified as to the circumstances may have willfully falsified their testimony or intentionally exaggerated the fact or they may be biased or mistaken as to the facts to which they are testifying. In circumstantial evidence, the facts must be proved to the satisfaction of the jury and it is for you to draw the inference from the facts proved. Now, whenever circumstantial evidence is relied upon to prove a fact, the circumstances must be proved and not themselves presumed. You must not base an inference upon an inference, nor accept a suspicious circumstance as a proof of fact.

In People versus Harris, the Court of Appeals of this State said, "All evidence is in a strict sense

more or less circumstantual whether consisting in fact which permits the inference of guilt or whether given by eye witnesses of the occurrence for the testimony of any witnesses is, of course, based upon circumstances more or less distinctly and directly observed but, of course, there is a difference between evidence consisting in facts of a peculiar nature in hence giving rise to presumption and evidence which is direct and consisting in positive testimony of any witness; and a difference is material according to the degree of exactness and relevancy. The weight of the circumstances and the credibility of the witnesses, The mind may be reluctant to conclude upon the issue of guilt in criminal cases upon evidence which is not direct and yet if the facts brought out when taken together all point in the one direction of guilt and to the exclusion of every other hypothesis, there is no substantial reason for any reluctance. Purely circumstantial evidence may be offered more as a safer form of evidence or it must rest upon the facts which to prove the truth of the charge made must collectively tend to establish the guilt of the accused. For instance, if any of the material facts of a case were at variance with the probability of guilt, it would

be the duty of the jury to give the defendant the benefit of the doubt raised. The fact has the essence of and is equivalent to a truth or that which is real. It is in the ingenuous combination of facts that they may be able to deceive or express what is not the truth. In the evidence of any witness as to proof of fact of an occurrence, we are not guaranteed against mistakes or falsehood or distortion of proof by exaggeration or prejudice, but when we are dealing with a number of established facts, if upon arranging, examining and weighing in our mind we reach only the conclusion of guilt, the judgement rests upon the pillars as substantial and sound as though resting upon the testimony of eye witnesses. The necessity of a resort to circumstantial evidence in criminal cases is apparent in the nature of things for a criminal act is sought to be performed in secret and an impending wrongdoer usually chooses his time and an occasion when most favorable to concealment and assiduously scheme to render detection impossible. All that we should require of circumstantial evidence is that they are established positive proof of the fact that from which the inference of guilt is to be drawn and that that inference is the only one which

can reasonably be drawn from those facts." Circumstantial evidence must point to the guilt of the defendant to the exclusion of every other reasonable hypothesis. If the circumstantial evidence be susceptible to two constructions, the most favorable to the innocence of the defendant should be adopted, but if the circumstantial evidence points in one direction and in one direction only, namely, the guilt of the defendant, or if the circumstantial evidence be inconsistent with every reasonable hypothesis of the innocence of the defendant and consistent only with his guilt, you are bound as jurors under the solemnity of your oath to regard this evidence as controlling and to be guided thereby.

There are two kinds of witnesses, expert and lay. A lay witness may only testify as to matters which he or she personally observed according to her experience. She is not permitted to draw any conclusion. A lay witness may not repeat what someone else told him. The expert witness on the other hand is suppose to have special knowledge and training in his particular profession or occupation. He is called as a witness to make his special knowledge available to the jury in order to assist you in your deliberations. He ma

express opinions about matters in his particular fiel and may be required to explain how he arrived at his opinion. The expert witness who testifies about a physical condition of an individual need not had treated her or even seen that individual. Now, the opinions expressed by Dr. Demaio, the expert witness in this case, are advisory only. You may reject his opinions entirely or you may accept his opinions. Th evidence of an expert is not to be accepted or reject ed at will but it to be watched and considered by you in the same manner as you considered the testimony of any other witness. It depends upon the accuracy, the veracity and the honesty of the witness. You are at liberty in considering and in weighing such testimony to disbelieve it when it is improbable or discredited or disproved by other evidence. The jury must not permit the witness to usurp the province of the jury by deciding the issue in controversy. The expert opinion is an aid and not a substitution for decision of the jury, and in considering the weight and force of such evidence, the jury may act upon their own general knowledge of the subject of the jury. He was called here to help you reach a true verdict. He is purely advisory and a determination rests with you not with the expert.

Now, as I have said, you are not to be influenced by what you may believe my opinion is in this case. So far as you are concerned, I have no opinion or judgment in the matter. If I had, it would not in the slightest manner be binding upon you. You are not to draw any inference from any rulings that I have made or any decision that I have made during the trial or from my denial of motions that I have an opinion as to the guilt or innocence of this defendant. If you are not satisfied beyond a reasonable doubt of the defendant's guilt, acquit him. If you are satisfied beyond a reasonable doubt of his guilt, find him guilty as charged or guilty of such acts in the indictment as had been so proven. In determining the degree of the crime that he is guilty of, if you conclude that he is guilty, the rule of law is as follows: "When it appears that a defendant had committed a crime and there is reasonable ground of doubt as to which of the degrees he is guilty, he can be convicted of the lowest of these degrees only." I am required by law to submit to you all the degrees in the charges made against him, but I am also required to tell you that if you find the defendant guilty, your duty is to find him guilty of the degree of the crime that the evi-

dence and the proof show that he committed. That is why I read the initial Penal Law as to the crime charges and the lesser degrees of those crimes.

Each lawyer has summed up. The summation has an important purpose, but the summation neither constitutes nor is it a substitute for the evidence in this case. Each interpreted the evidence as stated to you, the inference he drew therefrom and what conclusion he would like you to draw therefrom. Statements of counsel should be considered by you but only if the coincide with your own recollection of evidence adduced and the logical inference that you the jury draws from the evidence, but each of you must draw your own inferences and conclusions. You are not at liberty to draw such inferences as are reasonable from the facts that you find have been established. An inference may be called a deduction of fact, something which follows from none or proven facts according to the ordinary experiences which we have in our every day affairs. It is not, of course, to be confused with the mere guess or speculation which should be the reasonable or logical result of known facts as the matter of strict probability. An inference of fact when established is in itself the nature of proof.

However, no inference may be based upon an inference. Let your decision be free from sympathy and let it be free from prejudice. If you render a verdict based upon the evidence, both sides will receive a fair and equal day in this court. Under our law, no one is preferred and no one is exempt. No innocent person should be convicted and no innocent person whose guilt has been established to your satisfaction beyond a reasonable doubt should be acquitted. Let your verdict reflect an honest, intelligent and logical solution of the only issue presented to you, did the District Attorney by credible evidence establish the guilt of this defendant to your satisfaction beyond a reasonable doubt on any or all of the counts presented to you in the indictment. It is your obligation as jurors to calmly and patiently discuss the evidence in this case, to reason with each other, to make an honest effort to agree upon the facts, to apply the law given to you by the Court without question and while it is the duty of every juror to discuss and consider the opinion of his fellow jurors, each of you must decide the case on your own individual judgment. No juror is required to surrender any conscientious, honest view he entertains which is founded upon the evidence.

It is your duty to agree upon a verdict without surrender of your own personal conscientious opinion as a juror based upon all the evidence in this case. Your verdict must be unanimous. Your verdict may be not guilty or guilty as charged or guilty of either of the counts in the indictment and guilty of a lesse degree.

If after you retire for your deliberations, there be any disgreement amongst you as to any part of the testimony, you have a right to require that such testimony be read to you and the Court will direct that it be done. If you desire to be informed as to any point of the law governing the case or should you wis further instructions from the Court, you have a right to request such further information and instruction. In either case, ask the Court Officer to return you to the courtroom for the purpose of having such testi mony and instruction, and if at any time you should desire any exhibit which is in evidence, you have a right to request that that be submitted to you.

Are there any exceptions to the Charge?

MR. BRACKLEY: No exceptions.

THE COURT: Any exceptions?

MR. ERNST: No exceptions.

THE COURT: Any requests?

MR. BRACKLEY: No.

MR. ERNST: May we approach the bench, please?

THE COURT: Yes.

(WHEREUPON COUNSEL APPROACHED THE BENCH.)

MR. ERNST: I have no requests.

(THE COURT OFFICERS WERE DULY SWORN.)

THE COURT: Members of the Jury, you are now ready to go to the jury room and commence your deliberations, and the alternate jurors are now discharged. Thank you very much.

COURT CLERK: Will the alternate jurors please step this way.

(AT THIS POINT THE JURY WAS TAKEN FROM THE COURTROOM TO BEGIN DELIBERATION.)

(At 10:55 p.m. the following occurred:)

(Jury not present)

MR. BRACKLEY: Your Honor, in the presence of the defendant, it has been brought to our attention that two exhibits --

COURT CLERK: Three.

MR. BRACKLEY: Three exhibits were submitted for the jury, namely the two maps. I don't recall the number now, but I believe it was the diagram of the parking lot. The diagram of the hotel along with the DD5 of Officer Walsh. And we have no objection to the jury having that exhibit or any other exhibit that they ask for in the future, whether present or not.

(Jury enters courtroom)

COURT CLERK: Do both sides waive the jury roll call?

MR. LA GANA: Yes.

MR. BRACKLEY: Yes.

COURT CLERK: All jurors are present. Defendant is present with counsel. The district attorney is present by Mr. Philip LaGana.

THE COURT: Members of the Jury: I called you in to tell you that now or a little later, depending

upon how you feel about it, we are planning on sending you to a hotel. Do you feel that if you were given a few more minutes or so or that you are anywhere near a decision at this time?

FOREMAN: No, I am afraid we're not. I don't think we are, sir.

THE COURT: All right.

Mr. Brackley, if the defendant doesn't have any objection, and if the People don't have any objection --

MR. LA GANA: No objection.

MR. BRACKLEY: No objection.

THE COURT: -- We'll send them , the jury to a hotel. No objection?

MR. LA GANA: No objection.

THE COURT: All right.

JURORS: Can we make phone calls?

FOREMAN: It is rather complicated and involved and it will lose something in the translation. I would be willing to have him listen in on the conversation.

THE COURT: You can write it out. It is just not permitted. We'll do anything else, but we can't do that.

JUROR: I have a car parked on Washington

Street in front in the parking lot. I am just wondering how safe it will be there for the rest of the night.

JUROR: I have an illegally parked car. It will be tomorrow.

JUROR: Mine is illegally parked. It will be at 10:00 o'clock in the morning.

OFFICER: The hotel provides transportation. If they used their own cars, not enough to go with them.

THE COURT: Is there any way that they can move their cars.

OFFICER: The officer informs me that if they notify the precinct of the circumstances that they will take that into consideration.

THE COURT: Suppose you give us the license numbers and we'll notify the precinct.

JUROR: My question is, I am in a parking lot. I am just wondering how safe I am in that parking lot. Could I move it up nearer the courthouse?

OFFICER: It complicates matters, because the transportation will be on the way to the hotel. If one of us has to go with him to move his car, it will hold the others up because we have to travel in a body.

FOREMAN: What hotel are we going to?

OFFICER: Golden Gate Hotel.

JUROR: Can I use mine?

THE COURT: How many cars do you have? Do you have three cars here?

Can we move his car? I think that is better.

OFFICER: One of us will have to go with him and let him move his car closer to the courthouse.

THE COURT: We'll send the court officer with you to move your cars closer and the others, we'll notify the police precinct. All right.

MR. LA GANA: What time tomorrow morning, judge?

THE COURT: They'll come back tomorrow morning at 10:00 o'clock.

(Jury leaves)

MR. BRACKLEY: Your Honor, the defendant has no objection to a court officer going with one of the jurors to move their car closer to the court.

THE COURT: Tomorrow morning. Don't discuss the case.

COURT CLERK: Jury was admonished not to discuss the case.

(Recess until tomorrow morning)

Brooklyn, New York
October 21, 1969

96 JURY REQUESTS

COURT CLERK: The jury will please answer to your names.

(THE JURY ROLL WAS CALLED AND THE FOLLOWING OCCURRED.)

COURT CLERK: All jurors are present. Defendant is present with counsel. The District Attorney is present.

THE COURT: Good morning.

THE JURY: Good morning.

THE COURT: All right, the jury has submitted a request to this court signed by the foreman, Mr. R. H Larsen, and the requests is that we would like to hea the following testimony, Mrs. Walker, the owner of th grocery store and the patrolman that picked up Mrs. Walker after she reported the baby missing.

I believe that is Patrolman Fragapane. All righ will you read the testimony.

(WHEREUPON THE COURT REPORTER READ BACK THE REQUESTED TESTIMONY.)

THE COURT: Members of the Jury, I had noticed that some of you have been taking notes. Now, you ar not to read those notes to your fellow members of the jury. You are to use it solely for the purpose of

refreshing your own recollection because each juror must depend upon his own recollection of the evidence. All right, you may retire. Just a moment, I see you are going out. Remember, while you are at lunch to relax and don't deliberate about the case at lunch. Wait until you get back and commence your deliberation. All right, don't form any opinion or express any.

(WHEREUPON THE JURY WAS TAKEN FROM THE COURTROOM

COURT CLERK: Do both sides waive a jury roll call?

MR. ERNST: Yes.

MR. BRACKLEY: Yes.

COURT CLERK: All jurors are present. The defendant is present with counsel. The District Attorney is present.

THE COURT: All right, the jury's request as submitted by foreman, Mr. R. H. Larsen, is we would like to hear the interpretation of Kidnapping 1 and Kidnapping 2 from Judge Morton.

Will you mark this paper as Court's Exhibit Number 2 for identification.

COURT CLERK: Right, Judge.

THE COURT: I will read to you the third count

and the fourth count of the indictment.

The third count: "The Grand Jury of the County of Kings by this indictment accuses the defendant of the crime of kidnapping in the first degree committed as follows: The defendant on or about and between January 8, 1969 and January 9, 1969 in the County of Kings did abduct Delia Mott and did restrain the said Delia Mott for a period of more than 12 hours with intent to inflict physical injury upon the said Delia Mott and to violate and abuse her sexually."

The fourth count of this indictment reads as follows: "The Grand Jury of the County of Kings by this indictment accuses the defendant of the crime of kidnapping in the first degree committed as follows: The defendant on or about and between January 8, 1969 and January 9, 1969, in the County of Kings did abduct Delia Mott who died during such abduction and before she was able to return and to be returned to safety."

Now, I want to read to you a definition of abduct and restrain. "Abduction means to restrain a person with intent to prevent his liberation by either secreting or holding him in a place where he is not likely to be found or using, or threatening to use deadly physical force. The word restrain means to restrict a person'

movements intentionally and unlawfully in such manner as to intefere substantially with his liberty by moving him from one place to another or by confining him either in the place where the restriction commenced or in a place to which he has been moved without consent and with knowledge that the restriction is unlawful. A person is so moved or confined without consent when such is accomplished by physical force, intimidation or deception or any means whatever including acquiescence of the victim if he is a child less than 16 years old and the parent, guardian or other person, or institution having lawful control, custody of him has not acquiesced in the movement or confinement."

Now, as to your deliberation under the third count, you must decide whether the People have proven the elements under the third count beyond any reasonable doubt to your satisfaction and the elements that the People must prove are that Delia Mott was abducted by the defendant, that she was restrained for a period of more than 12 hours by the defendant and that this defendant did abduct Delia Mott with the intent to inflict physical injury and or violate and sexually abuse Delia Mott and that he accomplished the physica

injury or the violation of sexual abuse, and if you find these elements have been proven by the People to your satisfaction beyond any reasonable doubt, you must convict this defendant, and on the other hand if you find that these elements have not been proven to your satisfaction beyond any reasonable doubt, you must acquit the defendant, and if you acquit the defendant, of course, under that count, then you must go, you must consider, you may consider kidnapping in the second degree under the third count and kidnapping in the second degree is permitted when the defendant abducts. If the People prove to you that the defendant did abduct this child, Delia Mott, and regardless of duration or the confinement, regardless of the purpose of the abduction, then, of course, it is kidnapping in the second degree. It is just merely the People have shown you beyond any reasonable doubt that this child was abducted and nothing else, then, that is kidnapping in the second degree. Now, if you find that this is the case, that the People have proved to you that this child was abducted without any other factors such as the child being killed, the death of the child with they physical injury, the sexual abuse, then you must acquit. However, if you find that the People have

proved to your satisfaction beyond any doubt that this child was just abducted, then you must convict of kidnapping in the second degree.

The kidnapping under the fourth count of the indictment is when the person is abducted and dies during the abduction. There you have a person, if you find that the person was abducted and then the person dies during the abduction, and you find that the People have proved to your satisfaction that she was abducted and that the death did result during the abduction because of the reason stated by the People, then, of course, you must convict. If you find beyond any reasonable doubt that this is the case and if you feel that the People have failed to establish the fact that the child was abducted and the death resulted during the abduction, that is it. All that is required is that the child died during the abduction under the fourth count.

If you find that the People have proved these elements to your satisfaction beyond any reasonable doubt, you must convict the defendant under the fourth count. If you find that the People have failed to prove either of the elements to your satisfaction beyond any reasonable doubt, you must acquit this defen

dant under the fourth count of the indictment. If you acquit the defendant under the fourth count of the indictment, you must consider Kidnapping 2 under the fourth count and that is as I have stated to you under the third count. That is committed when a defendant abducts. If the People prove that the defendant abducted Delia Mott, nothing else, no other factor, then that is kidnapping in the second degree. If you find that the People have proven to you beyond any reasonable doubt that the defendant abducted the child, nothing else, then, of course, you must convict the defendant of kidnapping in the second degree. If you find that the People failed to satisfy you beyond any reasonable doubt that the defendant abducted Delia Mott, then, of course, you must acquit the defendant.

Will there be any other questions, Mr. Foreman?

THE FOREMAN: No, Your Honor.

THE COURT: All right.

(WHEREUPON THE JURY WAS TAKEN FROM THE COURTROOM TO CONTINUE ITS DELIBERATION.)

COURT CLERK: Do both sides waive the jury roll call?

MR. ERNST: Yes.

MR. BRACKLEY: Yes.

COURT CLERK: All jurors are present. Defendant is present with counsel. Assistant District Attorney is present.

THE COURT: Members of the Jury, in making the transition of the third count of the indictment to an explanation of kidnapping in the second degree, I inadvertently used the word must when I said if you acquit the defendant, you'll find that there is a reasonable doubt as to whether the People have proved the elements, the case against the defendant, you must acquit and then you must consider kidnapping in the second degree. The term I should have used is you may consider kidnapping in the second degree, and I used the same term under kidnapping in the first degree under the fourth count, and I told you that you must consider kidnapping in the second degree under the fourth count when it is you may. That is entirely up to you. You understand, and also in giving you an explanation of kidnapping in the fourth count, I want it clearly understood that all that is required under the fourth count is the abduction of the child and the death resulted during the abduction. That is the elements that the People must prove to you beyond any reasonable doubt under the fourth count. All right,

any questions as to that?

THE FOREMAN: I don't think so.

THE COURT: Anything further pertaining to this?

THE FOREMAN: Your Honor, can we get a copy of the indictment?

THE COURT: No.

MR. ERNST: May we approach the bench for a minute?

(WHEREUPON COUNSEL APPROACHED THE BENCH.)

THE COURT: Mr. Foreman, if you feel that it is necessary, counsel is willing to stipulate that you can write or copy it down if you want to. If you fee that it is necessary, counsel has informed me that they will stipulate that you can copy it.

THE FOREMAN: All right.

THE COURT: Now, will you permit Mr. Ernst and Mr. Brackley to look at that and see that it conforms

(THE FOREMAN HANDED THE WRITTEN COPY OVER TO BE GIVEN TO THE ATTORNEYS TO PERUSE.)

MR. ERNST: Mr. Brackley?

MR. BRACKLEY: Yes, Judge, it is all right. It is the third and the fourth count of the indictme

THE COURT: All right. Members of the Jury, I just want to emphasize to you that you are not

entitled to this, but since the attorneys have stipulated to it, I am going to allow you to have it, but I must tell you that this is merely a piece of paper that you are copying from. It is an accusation, nothing more. You understand that?

THE FOREMAN: Before we leave, Your Honor,--

MR. ERNST: Judge, may I suggest that if the jurors have any questions they write it out and give it to the Court.

THE COURT: Right, all right. Will you give the foreman a piece of paper? All right, the request from the jury is that the Court again explain first degree kidnapping and second degree kidnapping and the variations.

COURT CLERK: Have it marked?

THE COURT: Mark it as Court's Exhibit 3.

(COURT'S EXHIBIT 3 MARKED.)

THE COURT: Now, under the third count the indictment reads: "The defendant on or about and between January 8, 1969, and January 9, 1969, in the County of Kings did abduct Delia Mott and did restrain the said Delia Mott for a period of more than 12 hours with intent to inflict physical injury upon the said Delia Mott and to violate and abuse her sexually."

That means that the People must prove each element to you beyond any reasonable doubt that is that on and between January 8, 1969 and January 9, 1969, in the County of Kings, that the defendant abducted Delia Mott. Defendant did restrain the said Delia Mott for a period of more than 12 hours with intent to inflict physical injury upon Delia Mott and to violate and abuse her sexually.

Now, each of those elements must be proved to your satisfaction beyond any reasonable doubt for you to convict this defendant of kidnapping in the first degree under the third count, and if you have any reasonable doubt as to any of those elements, you must acquit this defendant under the third count of kidnapping in the first degree.

Now, under the fourth count, kidnapping in the first degree, "The defendant on or about and between January 8, 1969 and January 9, 1969, in the County of Kings, did abduct Delia Mott who died during such abduction and before she was able to return and to be returned to safety."

Now, what the People have to prove under this count is that on January 8, 1969 between that date and January 9, 1969 in the County of Kings that the defen-

dant abducted Delia Mott and that the child Delia Mott did die during that period of abduction. If the People prove to your satisfaction beyond any reasonable doubt those elements, then you must convict this defendant under the fourth count, kidnapping in the first degree. If the People fail to prove to your satisfaction beyond any reasonable doubt, then you must acquit the defendant.

Now, there are the variations I have given to you. Now, do you feel that is sufficient?

THE FOREMAN: I don't think it was entirely answered.

MR. BRACKLEY: I think he asked for the second degree again.

THE FOREMAN: Right.

THE COURT: Where is the paper? Oh, yes, you wanted the second degree. All right.

In the second degree, pardon me, that is committed when the defendant abducts. ' Period. When the defendant abducts: "If the People prove that this defendant abducted the child without any other aggravating factor, without allegations, that is kidnappin in the second degree. Just a mere abduction. If the People prove to your satisfaction beyond any reason-

able doubt that the defendant did abduct Delia Mott between January 8, 1969 and January 9, 1969, in the County of Kings, then you must convict the defendant, and if the People fail to prove to your satisfaction guilt beyond any reasonable doubt as to the abduction of Delia Mott, then you must acquit him." That is it. You want to write anything else out?

THE FOREMAN: No, I would like a sheet of paper, though.

THE COURT: Better give him a couple of sheets.

(WHEREUPON THE JURY WAS TAKEN FROM THE COURTROOM TO CONTINUE DELIBERATION.)

COURT CLERK: The jurors will please answer to your names.

(WHEREUPON THE COURT CLERK CALLED THE JURY ROLL AND ALL OF THE JURORS ANSWERED TO THE CALL OF THEIR NAME.)

COURT CLERK: All jurors are present. Defendant is present with counsel. The District Attorney is present by Assistant District Attorney Sheldon Greenberg.

Members of the Jury, have you agreed upon a verdict? Rise, Mr. Foreman.

THE FOREMAN: We have reached a verdict on thre-

counts, but we are deadlocked on the fourth.

COURT CLERK: As to the fourth count of the indictment the charge is murder. What is the jury's verdict?

THE FOREMAN: Not guilty.

COURT CLERK: As to the second count of the indictment the charge is murder. What is the jury's verdict?

THE FOREMAN: Not guilty.

COURT CLERK: As to manslaughter in the first degree under the second count, what is the jury's verdict?

THE FOREMAN: Not guilty.

COURT CLERK: As to manslaughter in the second degree under the second count, what is the jury's verdict as to manslaughter in the second degree?

THE FOREMAN: Isn't that the third count?

COURT CLERK: That is the second count. The second count is murder, but under the second count which charges murder, has the jury considered manslaughter in the second degree?

THE FOREMAN: No.

THE COURT: All right, proceed.

COURT CLERK: Under the third count of the in-

dictment which charges kidnapping in the first degree, what is the jury's verdict?

THE FOREMAN: Not guilty.

COURT CLERK: That is the third count which charges kidnapping in the first degree. Now, still under the third count, has the jury considered kidnapping in the second degree?

THE FOREMAN: Not guilty.

COURT CLERK: Now, under the fourth count of the indictment which charges kidnapping in the first degree. What is the verdict?

THE FOREMAN: Deadlocked.

COURT CLERK: Deadlocked. Cannot agree. Now, still under the fourth count as to kidnapping under the second degree?

THE FOREMAN: Deadlocked.

COURT CLERK: All right, be seated. Now, listen to your verdict as it stands recorded so far.

Under the first count of the indictment which charges murder, not guilty.

Under the second count of the indictment which charges murder, not guilty.

As to manslaughter in the first degree, not guilty.

As to manslaughter in the second degree, so far the jury has not considered.

Under the third count of the indictment which charges kidnapping in the first degree, not guilty.

As to kidnapping in the second degree, not guilty

Under the fourth count of the indictment which charges kidnapping in the first degree, deadlocked. The jury cannot agree.

As to kidnapping in the second degree, the jury is deadlocked. Cannot agree, and so say you all?

THE FOREMAN: Yes.

THE COURT: All right, Members of the Jury, as to the fourth count, the Court is going to return you for deliberation. We have been on this trial for 19 days, and the Court feels that you should make every possible effort to reach a decision one way or the other, so you are to be returned for further deliberation unless you desire to be sent out to dinner. We may do that. Suppose you send the jury out to dinner, and you will not discuss--

THE FOREMAN: Your Honor, may I say something? I personally would rather stay and forfeit the dinner if we can come to some agreement.

THE COURT: Maybe we can have something brought

in to the Members of the Jury.

THE FOREMAN: I don't think we can bring it in now, Judge. I don't know.

THE COURT: Then you will be returned to deliberate.

THE FOREMAN: Even if they just bring coffee and a danish.

COURT CLERK: We will try to get something.

THE FOREMAN: May we have the law on manslaughte second degree.

THE COURT: You just want the law on manslaughter, second degree?

THE FOREMAN: That is the one we didn't rule on.

THE COURT: That simply requires that the People must prove to your satisfaction beyond any reasonable doubt that there is such reckless conduct as to cause death to a person; death caused by the reckless conduct of the defendant.

There is no intention required in manslaughter, second degree.

MR. GREENBERG: May we approach the bench?

THE COURT: Certainly.

(WHEREUPON COUNSEL APPROACHED THE BENCH.)

THE COURT: Look, I am going to tell you, do not

consider manslaughter in the second degree, because from the evidence, there is no manslaughter in the second degree here.

(WHEREUPON THE JURY WAS TAKEN FROM THE COURTROOM TO CONTINUE ITS DELIBERATION.)

(THE JURY WAS RETURNED TO THE COURTROOM.)

COURT CLERK: Jurors, please answer the roll call:

(WHEREUPON THE JURY ROLL WAS CALLED AND ALL JURORS ANSWERED TO THE CALL OF THEIR NAMES.)

COURT CLERK: All jurors are present. Defendant is present with counsel. The District Attorney by Sheldon Greenberg is present.

THE COURT: The Court is in receipt of a notification by the jury signed by the Foreman, Mr. R. H. Larsen, stating that we are still not able to reach an agreement on the fourth count.

Will you poll the jury as to whether each has been able to reach a verdict.

COURT CLERK: Yes, Your Honor.

Members of the Jury, you say you cannot agree as to the fourth count of the indictment?

Roy Larsen, is that a fact?

MR. LARSEN: Yes.

COURT CLERK: Thaddesus Zoltowski, is that the

case?

MR. ZOLTOWSKI: That is right.

COURT CLERK: Miss Estelle Kokason?

MISS KOKASON: Yes.

COURT CLERK: Joseph Miller?

MR. MILLER: Yes.

COURT CLERK: Gerard E. Tiernan?

MR. TIERNAN: Yes.

COURT CLERK: Thomas Garland?

MR. GARLAND: Yes.

COURT CLERK: Bernard Novick?

MR. NOVICK: It is.

COURT CLERK: Benjamin Sulfian?

MR. SULFIAN: Yes.

COURT CLERK: Philip Napoli?

MR. NAPOLI: Yes.

COURT CLERK: John Lucardi?

MR. LUCARDI: Yes.

COURT CLERK: Bernhard Meyer?

MR. MEYER: Yes.

COURT CLERK: Mr. Gerard Occhifinto?

MR. OCCHIFINTO: Yes.

THE COURT: Does the District Attorney have any objection?

MR. GREENBERG: No, Your Honor.

THE COURT: All right. The Court finds that this jury does not agree. I will, on that basis, discharge the jury and restore the fourth count of the indictment to the trial calendar, and the jury is discharged with thanks.

COURT CLERK: All right, you may leave. You are all discharged.

* * *

I hereby certify that the foregoing is an accurate transcript of the minutes taken during the above-captioned proceedings.

Official Reporter